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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 874

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Respondent,

—against—

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
The Opinion Below	1
Jurisdiction	2
Questions of Law Presented	2
Statement of the Case	3
Reasons for Granting the Writ	10
I—The position taken by the Court of Appeals for the Second Circuit in upholding the Trial Judge's prejudicial comments before the jury is in direct conflict with the basic principles enunciated by the Courts of Appeals for the Fourth and Seventh Circuits and by this Court	10
II—The Court of Appeals for the Second Circuit is satisfied with the absence of affirmative evidence that improper remarks by a Trial Judge influenced the jury. It thus takes a position directly opposed to that repeatedly announced by this Court and by the Courts of Appeals in the Fourth and Fifth Circuits	
III—The Court of Appeals erred in holding that a charge by the Trial Judge that any verdict for the plaintiff "will automatically be a verdict for $300,000." was correct, although evidence had been received that all the goods which petitioner had agreed to insure had not been, and could not have been, loaded aboard the vessel. This holding is directly opposed to the holdings of every English and American authority on the subject	16

PAGE

Conclusion 21

Appendix A—Opinion of Court of Appeals for the Second Circuit ..... App. 1

Appendix B—Judgment of Court of Appeals for the Second Circuit ..... App. 8

Table of Cases Cited

Crow v. *DeManno*, 225 F. 2d 652 11

Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76 .. 14

Forbes v. *Aspinall*, 13 East 323 ..... 17, 18

Gomila v. *United States*, (C. A. 5), 146 F. 2d 372 15

McCandless v. *United States*, 298 U. S. 342 14

Quercia v. *United States*, 289 U. S. 466 ....11, 12, 14

Tobin v. *Harford*, (1864) 17 C. B. (N. S.) 528 .. 18

U. S. v. *Carmel*, 267 F. 2d 345 10

United States v. *Scott*, 257 F. 2d 344 10

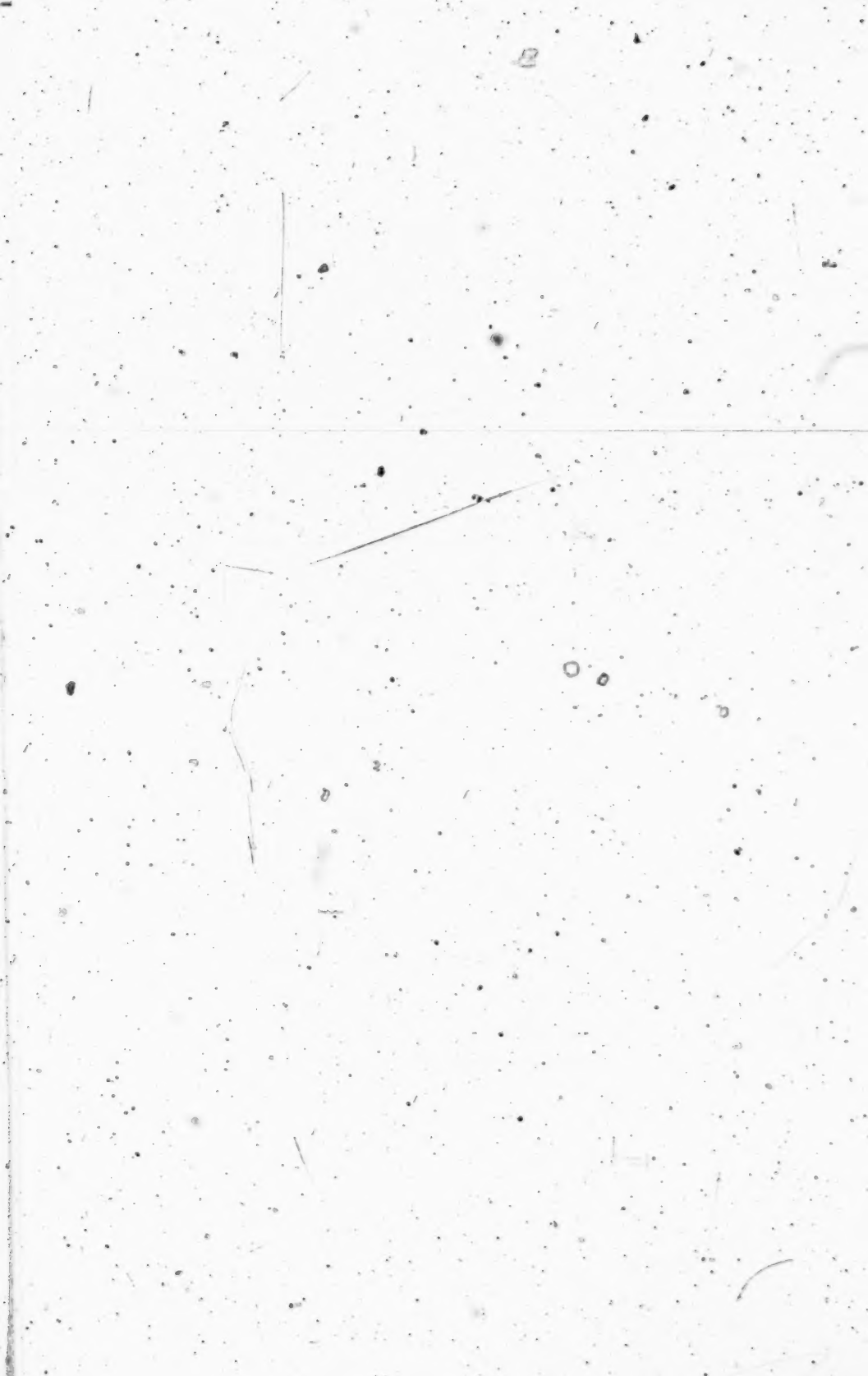
Vicksburg & Meridian R. R. v. *O'Brien*, 119 U. S. 99 ..... 13, 14

Virginian Ry. Co. v. *Armentrout* (C. A. 4), 166 F. 2d 400 ..... 12, 15

Watson & Hudson v. *The Insurance Co. of North America*, (1811) 29 Fed. Cas. 433 ..... 18, 19

Other Authorities Cited.

	PAGE
Phillips On Insurance, 5th Ed. Vol. 2, Sec. 1196, p. 10	19
Rules of Court of Appeals for the Second Circuit, Rule 28(c)	2
28 U. S. Code Sec. 1254(1)	2



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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

The Opinion Below

The opinion of the Court of Appeals for the Second Circuit affirming the judgment of the United States District Court for the Southern District of New York; entered upon a jury verdict, has not as yet been officially reported. It and the judgment of affirmance are printed as an Appendix to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 8, 1960. A stay of the issuance of mandate pending the filing of this petition was granted by the Court of Appeals on March 28, 1960, subject to the conditions of Rule 28(c) of that Court. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254(1).

Questions of Law Presented

1. Whether defendant was deprived of an impartial trial by statements of the Trial Judge in the presence of the jury, during a trial on issues formulated by the self-same Judge, that (a) if the plaintiff's attorney understood the real defense in the case he was ahead of the Trial Judge, and (b) the basic position of the defendant was that it did not want to pay the money?

2. Whether it was error for the Court of Appeals to affirm a judgment of the District Court for plaintiff, when there was no showing that the improper remarks in the presence of the jury "did not and could not have prejudiced the rights" of the defendant?

3. Whether, in an action on a marine cargo policy valued at $300,000, it was error for the Trial Judge to charge the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000", when one of the trial issues formulated by the self-same Judge, was whether all of the cargo which defendant agreed to insure was on board the barge when it sank, and after much evidence had been received

from which the jury could have found that much less than all of such cargo was on board?

4. Whether it was error for the Trial Judge to refuse to charge the jury that if only a part of the goods which defendant agreed to insure was shipped then any verdict for the plaintiff must be for a pro rata part of the insured value?

Statement of the Case

A broker representing a client in Manila wrote to the Manila agent of petitioner asking for insurance on "a large amount of spare parts and equipment" to be shipped from Manila to Davao on a barge. In his letter the broker represented the proposed shipment to be "of high value" with an approximate tonnage of between 300 and 350 tons (Ex. W, 155a).* A few days later the broker again wrote to petitioner's agent that "The amount of insurance coverage is $300,000 premiums payable in dollars from the New York office of Mr. Appel" (Ex. Y, 156a). In the same letter the broker stated that the value of the shipment was estimated at $1,000 per ton (Ex. Y, 157a). Hence, a valuation of $300,000 (300 tons at $1,000 per ton) was arrived at. While the cargo was being loaded three months later, the broker knew that the shipment should consist of 300 tons (102a). He received this information from the assured (102a).

The barge, concededly carrying no more than 120 tons, sank one day out from Manila.

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* Figures followed by "a" refer to pages of appellant's appendix, Volume I of certified record.

Figures followed by "A" refer to pages of appellee's appendix, Volume II of certified record.

Figures preceded by "App." refer to appendix to this petition.

After the insurance claim was made, the assured assigned his interest in the policy to an Indonesian living in Hongkong who claimed to have originally sold the United States surplus goods in question to the assured. He is the plaintiff-respondent in this action.

Four days before the trial commenced, the trial Judge held a pre-trial conference and, in a formal order, stated the issues to be tried. The first two of the four issues thus formulated read as follows:

"1. Is the plaintiff entitled to recover the sum of $300,000, plus interest, as insurance, or, if not, how much, if anything is plaintiff entitled to recover?

"2. Is the plaintiff prevented from recovery in this action by virtue of a misrepresentation as to the weight or value of the cargo to be shipped?" (Record on Appeal, p. 5507 at p. 5509)

During the trial defendant offered extensive proof to demonstrate that all of the cargo which defendant had agreed to insure, could not have been on board the barge and therefore was never at risk.

The barge master, a witness for the plaintiff, testified that only about 100 tons (one-third that represented to defendant) were loaded on the barge (29a). An expert witness for defendant testified that based upon the known displacement of the barge no more than 80 tons of cargo could have been on board (107a).

According to the testimony of plaintiff's own witness, the insured shipment was calculated to occupy approximately 50,000 cubic feet (107a, 108a), which,

when loaded on the barge, would have resulted in cargo tiered to a height of 16 feet (108a), whereas in fact the cargo was piled to less than one-third of that height—5 feet (77a).

In addition, defendant offered proof that many sizable individual items allegedly included in the cargo shipped, could not have been on the barge, because in the words of the surveyor, they were "too big to be in that LCT (the barge) and I never saw anything like that on board the LCT 732" (80a).

The Trial Judge refused to charge the jury that if it should find that only part of the expected cargo had been put at risk, the verdict should be based upon a pro rata share of the total valuation set forth in the policy of insurance (150a). He erroneously charged the jury that if its verdict should be for the plaintiff it "will automatically be a verdict for $300,000" (146a).

The Court of Appeals upheld the Trial Judge's position in the following words,

> "The court's charge was correct. The policy was a valued policy for $300,000. It was issued to cover the goods which Appel had in a warehouse in Manila. There was no evidence that less than all of the goods covered by the insurance were shipped. The tonnage of the goods was misstated, and that posed the question of materiality which we have discussed above. Once the jury had resolved that question, if there was a question to be resolved, it had to either find for the defendant on the ground of material misrepresentation, or find for the plaintiff for the amount

of the policy. To have authorized the jury to find for the plaintiff, but for a lesser amount, would have been to authorize them to bring in a compromise verdict not justified by the evidence" (App. 6).

The above quoted statement that the policy "was issued to cover the goods which Appel had in a warehouse in Manila" (App. 6) is not correct. The policy contains no such provision. It referred only to "Irrigation and road building mach'y and equipment and spare parts" (Ex. 6, 567A). Nor does either of the two letters written by the broker to the agent prior to the issuance of the policy contain any such provision (Ex. W, 155a, Ex. Y, 156a). As noted above, and contrary to the statement of the Court of Appeals, there was substantial evidence that much less than all the insured goods was shipped.

The Court of Appeals apparently concluded that the jury, having determined the issue of the materiality of the proven misrepresentation (of the weight of the insured goods at the time the policy was issued), could not, thereafter, consider whether all the cargo insured was actually shipped or permit such an issue to affect their verdict.

There is absolutely no connection between (a) the issue of materiality of misrepresentations made prior to issuance of the marine policy, and, (b) the separate and distinct question, whether all the insured cargo was put at risk three months later. The Trial Judge, when he formulated the issues in the pretrial order, noted the distinction and separately formulated each issue (Record on Appeal p. 5507 at p. 5509). His

error lay in not recognizing that distinction in his charge to the jury.

Late in the trial, the plaintiff recalled the assured as a rebuttal witness and, during an argument on the propriety of a question, the plaintiff's attorney stated in the presence of the jury that "for the first time I understood what the real defense in this case was" (122a).

The Trial Judge immediately interjected,

> "If you understand it you are ahead of me" (122a).

After denying a motion for a mistrial (124a), the Trial Judge said to the defense counsel, in the presence of the jury,

> "All right, then whatever defense do you have" (125a).

Defense counsel started to reply to the Trial Judge's question, as follows:

> "The basic position we have * * *" (125a).

At that point, in the middle of the defense counsel's answer to the Judge's question, the Judge interrupted and stated,

> "Is that you do not want to pay the money. That is your basic position here, isn't it?" (125a).

The defense counsel again objected (125a).

This issue, whether a defendant, even if it be an insurance company, is entitled to a fair and impartial

trial to a jury, was squarely presented to the Court of Appeals. That Court disposed of the question by substituting sweet phrases for the raw language of the record, saying:

> "During the trial of the case, the Judge said, in the presence of the jury, that he did not yet understand what the defendant's defense was, and asked counsel if it was only that they did not want to pay the money" (App. 7).

Having thus emasculated the record, the Court of Appeals further excused the first comment of the Trial Judge by stating that, "It was high time that the issues be defined for the Judge and the jury, and it was proper for the Judge to insist that they be defined" (App. 7). The issues had been defined by the very same Judge in the pre-trial order (Record on Appeal p. 5507 af p. 5509). In fact, the Trial Judge was quite aware of the issues. On the following day, out of the presence of the jury, he denied the plaintiff's motion for a directed verdict (132a) and plaintiff's motions to dismiss the first and second affirmative defenses (128a, 129a, 130a).

The prejudicial interruption by the Trial Judge of an answer to his own question, to put in counsel's mouth the statement that the only defense was a desire not to pay, is disposed of by the Court of Appeals in the following language:

> "His casual, and obviously humorous, remark about not wanting to pay the money might better have been left unsaid, but we have no idea that it made an impression on the jury which affected the outcome of the case" (App. 7).

There is nothing in the trial record to support the Court of Appeals' gratuitous statement that the remark was "casual and obviously humorous".* A mere reading of the language demonstrates the opposite.

Defense counsel's immediate reaction to the Trial Judge's remark demonstrates the absence of casualness or humor—

> "I have to again object to these remarks, much as I regret that I have to do it, your Honor." (125a)

It is submitted that the Court of Appeals also erred in denying the defendant a new trial because it had "no idea that it (the Trial Judge's remark) made an impression on the jury which affected the outcome of the case" (App. 7). The remark which the Court of Appeals itself conceded "might better have been left unsaid," was improper and erroneous and it cannot be disregarded unless it should affirmatively appear from the record of the trial that it did not, and could not, have prejudiced the defendant's right to a fair trial.

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* If the respondent claims that there is a single reference in the trial record to indicate that the judicial remark was "casual" or "obviously humorous" he owes it to this Court to identify any such reference in his answer to this petition.

REASONS FOR GRANTING THE WRIT

I

The position taken by the Court of Appeals for the Second Circuit in upholding the Trial Judge's prejudicial comments before the jury is in direct conflict with the basic principles enunciated by the Courts of Appeals for the Fourth and Seventh Circuits and by this Court.

When the Court of Appeals for the Second Circuit refused to grant the petitioner a new trial on the issue of the Trial Judge's unfair and prejudicial comment in the presence of the jury—that defendant's basic position was that it did not want to pay the money—it took a position directly in conflict with the decision of the Court of Appeals for the 7th Circuit in *United States* v. *Scott*, 257 F. 2d 344, 377 where that Court stated:

> "The influence of the trial judge on the jury is necessarily and properly of great weight, Starr v. United States, 1894, 153 U. S. 614, 626, and he should not say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts. United States v. Levi, 7 Cir. 1949, 177 F. 2d 833. It is the duty of the trial judge to endeavor to maintain throughout the trial an atmosphere of impartiality. United States v. Wheeler, 7 Cir. 1955, 219 F. 2d 773."

The Court of Appeals for the 7th Circuit adhered to that position in *U. S.* v. *Carmel*, 267 F. 2d 345, 350.

It is accepted law that the basic principles of fairness and impartiality are the same in civil and criminal cases. In *Crow* v. *DeManno*, 225 F. 2d 652, 655, the Court of Appeals for the First Circuit said:

> "The cases cited above (Quercia v. United States, 289 U. S. 466, and United States v. Brandt, 196 F.2 653) are both criminal. We have no doubt, however, that the principles enunciated in them apply as well to civil cases. No trial in court is ever a purely private controversy in which the public has no interest. 'The State, whose interest it is the duty of court and counsel alike to uphold, is concerned that every litigation be fairly and impartially conducted and that verdicts of juries be rendered only on the issues made by the pleadings and the evidence'. N. Y. Cent. R.R. Co. v. Johnson, 1929, 279 U. S. 310, 318."

Petitioner submits that even an insurance company is entitled to fair treatment, and to the application of the principles so eloquently stated for this Court, and all other courts, by Chief Justice Hughes in *Quercia* v. *United States*, 289 U. S. 466, 470:

> "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'. This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'."

The decision of the Court of Appeals in the instant case is also directly in conflict with the decision of the

Court of Appeals for the Fourth Circuit in *Virginian Ry. Co.* v. *Armentrout*, 166 F. 2d 400, 405 where Judge Parker said:

> "The judge occupies a position of great influence with the jury in conducting a trial; and while he should not hesitate to exercise the power of comment to clear away false issues and lead the jury into a proper understanding of the facts, he should be careful not to assume the role of counsel or to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts."

If this had been a criminal trial and the trial judge had interrupted defense counsel, to state that the defendant's basic position was that he did not want to go to jail, it would have been obvious to all that the defendant did not have a fair trial. Petitioner respectfully submits, that it is no less erroneous in a civil trial for the trial judge to tell defense counsel, in the presence of the jury, that defendant's basic position is that it does not want to pay the money.

The approval of such conduct is not only contrary to the holdings of the Courts of Appeals in other circuits but it is also contrary to the admonition given by this Court in *Quercia* v. *United States*, 289 U. S. 466, 470 that an expression of judicial opinion "should be so given as not to mislead, and especially that it should not be one-sided".

It would be difficult to conjure up a more one-sided expression of judicial opinion before a jury than the

comment that the basic defense an insurance company defendant had was a desire not to pay the money.

The decision of the Court of Appeals for the Second Circuit establishes a new, and low, standard for the conduct of jury trials, far from the standards of fairness required by this Court.

II

The Court of Appeals for the Second Circuit is satisfied with the absence of affirmative evidence that improper remarks by a Trial Judge influenced the jury. It thus takes a position directly opposed to that repeatedly announced by this Court and by the Courts of Appeals in the Fourth and Fifth Circuits.

The Court of Appeals in the case at bar refused to order a new trial since, it said, it had no idea that the Trial Judge's comment (that the defendant's only defense was a desire not to pay the money) made an impression on the jury which affected the outcome of the case (App. 7). That statement of law is directly contrary to prior rulings of this Court and of the Courts of Appeals for other Circuits.

This Court said in *Vicksburg & Meridian R.R.* v. *O'Brien*, 119 U. S. 99, 103:

> "While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the

error complained of did not and could not have prejudiced the rights of the party. Smiths v. Shoemaker, 17 Wall. 630, 639; Deery v. Croy, 5 Wall. 795; Moores v. Nat. Bank, 104 U. S. 625, 630; Gilman v. Higby, 110 U. S. 47, 50."

Again, in *McCandless* v. *United States*, 298 U. S. 342, 347, this Court held that a judicial error relating to "substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. *United States* v. *River Rouge Co.*, 269 U. S. 411, 421; *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82; *Williams* v. *Great Southern Lumber Co.*, 277 U. S. 19, 26." (Emphasis is that of the Court.)

In *Fillippon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 82, this Court held that in jury trials erroneous rulings are presumptively injurious and "furnish ground for reversal unless it affirmatively appears that they were harmless."

In *Quercia* v. *United States*, 289 U. S. 466, 470, this Court said that, "The influence of the trial judge on the jury is necessarily of great weight and his lightest word or intimation is received with deference, and may prove controlling."

This Court has consistently held that a reversal will be ordered unless it appears beyond doubt that the error complained of did not, or could not, have prejudiced the rights of a party litigant. Or to put it another way, this Court has consistently held that error is ground for reversal unless it *affirmatively* appears that it was not prejudicial.

In the case at bar, the Court of Appeals refused to follow the rules established by this Court in the above cases. Having had the above quoted opinions of this Court brought to its attention by oral argument and by briefs, the Court of Appeals clearly erred. No appellate judge could seriously say that the comments of the Trial Judge before the jury (recited on p. 7 of this petition), *could not have prejudiced* the rights of the defendant.

The Courts of Appeals in other Circuits have also held that a Trial Judge should not say anything that *might* prejudice the rights of a party before a jury.

In *Virginian Ry. Co.* v. *Armentrout* (C. A. 4), 166 F. 2d 400, 405, Judge Parker said that a trial judge "should be careful not to assume the role of counsel or to say anything which might have the effect of prejudicing the cause of either party before those whose duty it is to decide on the facts".

In *Gomila* v. *United States,* (C. A. 5), 146 F. 2d 372, 374, the Court held that,

> "The opinion of the judge, on account of his position and the respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part."

Was it impartial conduct for the Trial Judge in the case at bar to state in the presence of the jury that he didn't comprehend the defense and that the defendant's basic position was a desire not to pay, although he himself had formulated the issues and subsequently,

out of the presence of the jury, denied plaintiff's motions for a directed verdict and for dismissal of affirmative defenses?

The petitioner respectfully requests that this Court grant certiorari and answer this question in the negative.

III

The Court of Appeals erred in holding that a charge by the Trial Judge that any verdict for the plaintiff "will automatically be a verdict for $300,000." was correct, although evidence had been received that all the goods which petitioner had agreed to insure had not been, and could not have been, loaded aboard the vessel. This holding is directly opposed to the holdings of every English and American authority on the subject.

The defendant introduced evidence that all the goods defendant agreed to insure were not, and could not have been, on the barge. It was error, therefore, for the Trial Judge to charge the jury that any verdict for the plaintiff "will automatically be a verdict for $300,000." It was also error for the Court of Appeals to hold that once the question of materiality of the broker's representations prior to the issuance of the policy had been decided by the jury in favor of the plaintiff, the jury had to find for the plaintiff for the amount of the policy (App. 7). There is no connection between the materiality of a misrepresentation of the amount of cargo to be insured, and the question whether all the cargo defendant agreed to insure had been loaded on the barge.

The position on this question taken by the two lower courts, is opposed to every holding of every Court in England and the United States.

Nearly 150 years ago in *Forbes* v. *Aspinall*, 13 East 323, Lord Ellenborough considered the same erroneous theory adopted by the Trial Judge in the case at bar, stating at page 325:

> "But the plaintiffs contend, that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss."

At page 326, Lord Ellenborough said:

> "The question then is, whether it makes any essential difference that this is the case of a valued policy? And we are of opinion, upon full consideration, that it does not."

At page 327, he stated the rule as follows:

> "The valuation, however, in the case of goods, looks to all the goods intended to be loaded; and in the case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured: and if by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part."

Lord Ellenborough, at page 327, demonstrating the folly of plaintiff's theory, assumed a situation where it was intended that 500 hogsheads of sugar should be shipped, but the ship takes on board only

100 hogsheads and is lost. In a rhetorical question the English Judge asked, "Can it be contended that the assured shall recover to the full amount of the valuation, that is for the whole 500, when he has lost only 100?"

In *Tobin* v. *Harford*, (1864) 17 C. B. (N. S.) 528, 536, Lord Blackburn dealt with the same question in the following words:

> "With regard to the real point to be decided, the fact that this is a valued policy is, in my mind, a mere accident, and does not affect the question. The question whether there is a total, or a partial loss, is in this case, as I think it ought in every case to be, quite independent of whether the policy was valued or not. The question is, what is the subject-matter that is covered by the insurance? And whether the whole of the subject-matter is lost, in which case it would be a total loss; or whether only a part of it is lost, in which case it would be a partial loss only, the amount of which would depend upon the proportion which the part that was lost bore to the whole subject-matter of the insurance."

Mr. Justice Washington in *Watson & Hudson* v. *The Insurance Co. of North America*, (1811) 29 Fed. Cas. 433, 434, stated the applicable law as follows:

> "The agreed value being intended, by both parties, to fix a just standard by which to ascertain the measure of the promised indemnity, it of course ceases to be obligatory, if, from any circumstances, it fails to furnish such standard. This happens in every instance where only a

> partial loss has happened, or where the property has been greatly overvalued. But it is not because of fraud in the overvaluation, that the policy is opened; for if it happen by accident, as by a part only of an expected cargo being put at risk, the insurer is not bound by the agreed value."

The leading American textbook authority, *Phillips On Insurance*, 5th Ed. Vol. 2, Sec. 1196, p. 10, states the correct rule of law in the following words:

> "A valuation of a cargo avails only pro rata where only a part of subject valued is at risk."

The Court of Appeals, in an opinion that failed to cite a single authority on any question, stated that, "There was no evidence that less than all of the goods covered by the insurance were shipped" (App. 6). That statement is erroneous, and easily demonstrated to be erroneous—from the trial record.

The broker, plaintiff's agent, testified that he knew—because the assured told him—that at the very time of the loading the shipment should weigh 300 tons (102a). Concededly, the goods shipped weighed no more than 120 tons (118a).

Defendant's expert, using plaintiff's own figures, testified that if the cargo represented to defendant had been on board it would have occupied 50,000 cubic feet and would have been piled 16 feet high on the barge (107a, 108a). Actually, the cargo on the barge was piled only 5 feet high (77a).

Plaintiff's surveyor testified that the longest measurement for any item on the barge was 5 feet (83a),

and that the Gray Marine Diesel Engines and the Hobart Arc Welders were "too big to be in that LCT and I never saw anything like that on board the LCT 732" (80a). He also testified that the D. & M. Economy Lathe was not on the barge (84a). Other witnesses testified that various items claimed by plaintiff to have been lost were so large that they could not have been aboard—since they were substantially larger than 5 feet (115a, 116a, 117a).

In addition, plaintiff's witness testified that the lost goods were "all brand new" (45a) and were "cleaned, painted and cosmolene and grease put on exposed parts" (49a). However, two of plaintiff's surveyors testified that the machinery loaded on the barge was "rusty" (85a; 89a) and not covered with grease (90a).

In short, the Court of Appeals was completely and clearly wrong when it stated that, "There was no evidence that less than all of the goods covered by the insurance were shipped" (App. 6).

Moreover, the Court of Appeals was clearly wrong even assuming—without conceding—the validity of its unsupported conclusion that the policy "was issued to cover the goods which Appel had in a warehouse in Manila" (App. 6). For, based upon the testimony of Server, plaintiff's witness, that the goods occupied a calculated area of the warehouse (59a), defendant proved by expert testimony, without refutation, that such a quantity of goods would have been piled 16 feet high on the barge (107a, 108a). The goods actually loaded aboard the barge were piled to a height of only 5 feet (77a).

There was, therefore, strong and abundant evidence that all the goods were not shipped. True, a jury might, or might not, have determined this issue in favor of the plaintiff—but the important point is that the jury was deprived of an opportunity to determine the issue because the Trial Judge, over objection (150a), charged them that any verdict for the plaintiff "will automatically be a verdict for $300,000" (146a).

CONCLUSION

By reason of the premises, a writ of certiorari should issue to review the decision of the Court of Appeals herein.

Dated: April 20, 1960.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 175—October Term, 1959.

(Argued February 3, 1960. Decided March 8, 1960.)

Docket No. 25848

NELSON H. LEO, doing business as OVERSEAS ASSOCIATED CORPORATION,

Plaintiff-Appellee,

—v.—

INSURANCE COMPANY OF NORTH AMERICA,

Defendant-Appellant.

Before:

MEDINA and WATERMAN, *Circuit Judges,* and MADDEN, *Judge,* United States Court of Claims.*

Action by insured on marine insurance policy. Insurer appeals from judgment of United States District Court for the Southern District of New York, Dawson, *J.,* entered upon jury verdict, awarding insured full value of policy. Affirmed.

* Sitting by designation.

DONOVAN, LEISURE, NEWTON & IRVINE (Robert M. Loeffler, Sidney P. Howell, Jr., Thomas J. Garrity, of counsel), New York City; In association with Honorio Poblador, Jr., Manila, Republic of the Philippines, *for Appellee.*

BIGHAM, ENGLAR, JONES & HOUSTON (Martin P. Detels, Vincent L. Leibell, Jr., Charles W. Harvey, of counsel), New York City, *for Appellant.*

MADDEN, *Judge:*

After a trial before a jury, a judgment for the plaintiff in the amount of $300,000 was rendered in the United States District Court for the Southern District of New York. The defendant appeals.

The plaintiff's complaint alleged that the defendant insurance company had issued to one Appel a marine insurance policy covering irrigation and road-building machinery valued at $300,000 to be shipped on an approved barge in tow sailing from Manila to Davao, Philippine Islands; that the goods were shipped, the barge sank and the goods were lost. The complaint alleged that Appel had assigned his interest in the policy to the plaintiff; that a claim had been duly filed with the insurance company and had been denied by it. The suit was for $300,000.

The defendant's answer admitted the issuance of the policy and the refusal to pay, and denied generally the other allegations of the complaint. The answer also set up three affirmative defenses, only one of which is relevant in the instant appeal. That defense was that Appel had misrepresented to the insurance

company that the cargo insured weighed at least 300 tons whereas in fact it weighed less than one-third that amount.

Appel's insurance broker, in Manila, in negotiating with the defendant insurance company for the placing of the insurance, wrote on August 12, 1953 to the defendant's local agent in Manila saying that the broker's client, Appel, was the co-owner of a large quantity of spare parts and equipment in Manila "of high value—I would venture to say $300,000." He said that Appel desired marine insurance for a contemplated transportation of the goods by water from Manila to Davao, and fire insurance before and after the water transportation. At the end of a fairly long letter of inquiry the plaintiff's broker wrote, "The approximate tonnage of this equipment is between 300 and 350 tons."

On August 14 the defendant's local agent wrote the plaintiff's broker asking for further information about the subject of the proposed insurance. This rather long letter contained the following sentence, "In any event, prior to the writing of this cover, we would require a more definite valuation." In answer to this letter the plaintiff's broker wrote:

> While the value of these shipments may seem high, we have checked and we find that on most spare parts for Diesel engines, the values run very high, and in this case, while an average of $1,000 per ton is estimated, we believe that to replace this equipment would cost almost three times as much. * * * Mr. Appel's actual book value of this equipment is $283,000 and we have pointed out that in view of reconditioning charges, packing, towing, etc., the $17,000 increase would definitely be in order.

After receipt of this letter the defendant's local agent in Manila wrote the defendant's home office in Philadelphia requesting the defendant to issue the policy here sued upon. This letter said that Appel was a valued client of Elser, Inc., the insurance broker in Manila which had negotiated the policy for Appel, and which company was, the letter indicates, a valued client of the defendant. The letter, and the policy issued pursuant to it, made no mention of tonnage.

So far as appears, all the goods co-owned by Appel and warehoused in Manila, i.e., the goods referred to in the correspondence leading up to the issuance of the policy, were loaded on the barge and were lost. They did not weigh 300 tons. They weighed about 120 tons. The defendant says that it would not have issued the policy had it not been for the misstatement in the letter of the plaintiff's agent that the goods weighed 300 tons.

The statement of the plaintiff's agent about the tonnage was greatly in error. The question for the jury was whether the statement was material, i.e., did it play any material part in inducing the defendant to issue the insurance? The jury must have concluded that it did not, since the jury was adequately instructed on the subject. The jury's conclusion was entirely reasonable. The book value which Appel represented to Elsen, Inc., the defendant's valued client, and which Elsen, Inc. reported to the defendant, would have been heavily relied on by an insurance company. That value was confirmed at the trial by the plaintiff's introduction of an inventory with specific values ascribed to each item, and by the deed of sale by which Appel had acquired the goods which showed that he had paid or obligated himself to pay

$326,480.38 for them two months before the policy in question was issued.

To be sure, the defendant produced at the trial two qualified expert witnesses, who, in response to a hypothetical question whether a representation that a shipment weighed between 300 and 350 tons with an average estimated value of $1,000 per ton was a circumstance that would materially affect the risk, each answered in the affirmative. It is worthy of note that the defendant's agent or agents who considered the issuing of the policy did not testify as to whether in fact the erroneous representation had induced them to issue it.

The defendant complains that the District Court did not give to the jury a specific instruction requested by the defendant to the effect that if the jury found that the misrepresentation of Appel's broker as to the tonnage of the shipment was material, the jury must find for the defendant. The court had, after reviewing the evidence relating to the misstatement of the tonnage, charged the jury:

> Also if you should find that the insurance company has established by a fair preponderance of the evidence that the insurance contract was issued as a result of fraud or misrepresentation of material facts, then, of course, you would have to decide for the defendant, because then the policy would be void.

We think the charge given by the court fairly presented the problem to the jury, and that it was well within the court's discretion to refuse to charge upon particular bits of evidence. The charge requested by the defendant was improper in that it did not

state that a misrepresentation, though material, must be found to have been in fact an inducing cause of the making of the contract in order for it to be a ground for nullifying the contract.

It should also be said that there was probably not enough evidence of materiality to justify submitting the question to the jury. The expert testimony referred to earlier herein seems to us to have been of no weight. The hypothetical question did not describe the kind of goods to which it related. As to many kinds of goods having an ascertainable market value per ton, a misstatement of the tonnage would be a misstatement of value, which would be material. As to many other kinds of goods, including the goods here involved, an insurance company might not relate tonnage to value at all. As we have said, there was no evidence at all that the defendant had, in fact, relied on the representation of tonnage in deciding to issue the policy.

The defendant complains of the court's instruction that if the jury should return a verdict for the plaintiff, it should be for $300,000. The defendant says that the court should have permitted the jury to bring in a verdict for a lesser sum.

The court's charge was correct. The policy was a valued policy for $300,000. It was issued to cover the goods which Appel had in a warehouse in Manila. There was no evidence that less than all of the goods covered by the insurance were shipped. The tonnage of the goods was misstated, and that posed the question of materiality which we have discussed above. Once the jury had resolved that question, if there was a question to be resolved, it had to either find for the defendant on the ground of material misrepresenta-

tion, or find for the plaintiff for the amount of the policy. To have authorized the jury to find for the plaintiff, but for a lesser amount, would have been to authorize them to bring in a compromise verdict not justified by the evidence.

The defendant complains of the court's refusal to give a specific charge that if the jury found that the crates and cases contained scrap or rusty metal equipment, then they must find for the defendant because then the agreed valuation would have been arrived at by both a misrepresentation and a concealment of a material fact.

The court's refusal to charge the jury on particular bits of evidence was applicable to this request, and was proper. The court's charge that if the policy was issued as a result of fraud or material misrepresentation it was void, was sufficient.

During the trial of the case, the Judge said, in the presence of the jury, that he did not yet understand what the defendant's defense was, and asked counsel if it was only that they did not want to pay the money. That the Judge had been unable to get a clear understanding of the issues was natural, since so many defenses were suggested or hinted at but no substantial evidence was offered to support them. It was high time that the issues be defined for the Judge and the jury, and it was proper for the Judge to insist that they be defined. His casual, and obviously humorous, remark about not wanting to pay the money might better have been left unsaid, but we have no idea that it made an impression on the jury which affected the outcome of the case.

We find no merit in the appeal and the judgment is therefore affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

NELSON H. LEO, doing business as Overseas ASSOCIATED CORPORATION,

Plaintiff-Appellee,

v

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,

Defendant-Appellant.

175

JUDGMENT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FILED MARCH 8, 1960

A. DANIEL FUSARO, CLERK

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of March, one thousand nine hundred and sixty.

Present: HON. J. WARREN MADDEN,
Judge, U. S. Court of Claims,

HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

NELSON H. LEE, doing business as Overseas Associated Corporation,
Plaintiff-Appellee,

v

INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk